No. 85-2079

In the Supreme Court of the United States

OCTOBER TERM, 1986

LABORERS HEALTH AND WELFARE TRUST FUND, FOR NORTHERN CALIFORNIA, ET AL., PETITIONERS

v.

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General

LOUIS R. COHEN
Deputy Solicitor General

GLEN D. NAGER
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

CAROL A. DE DEO
Deputy Associate Solicitor

ELLEN L. BEARD
Attorney
Department of Labor
Washington, D.C. 20210

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether a federal district court has jurisdiction under Sections 502 and 515 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132 and 1145, over an action by the trustees of multiemployer employee benefit plans to collect contributions from a delinquent employer, where the employer's alleged obligation to make contributions arises from its duty under Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), to refrain from unilaterally changing terms and conditions of employment during post-contract expiration collective bargaining.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners are multiemployer employee benefit plans (Pet. 2). They were established by collective bargaining agreements and trust agreements between the Northern California District Council of Laborers and certain multiemployer bargaining associations representing construction industry employers in Northern California, and between the District Council of Plasterers and Cement Masons of Northern California and the same multiemployer associations (*ibid.*). From at least 1980 to 1983, respondent, Advanced Lightweight Concrete Company, Inc., was a member of one of these multiemployer bargaining associations, Associated General Contractors of California (AGC), and thus was a party to AGC's collective bargaining agreements with the two unions (*id.* at 2-3; Pet. App. A2-A3). Those agreements required respondent

to make specified monthly contributions to petitioners for each hour that its covered employees worked (*id.* at A4).

By letter dated April 1, 1983, respondent notified the unions that it was withdrawing bargaining authority from AGC (Pet. 3; Pet. App. A4). Respondent indicated that it was ready to negotiate independently with the unions (*id.* at A4-A5; Pet. 3), but that it would not be bound by AGC's master agreements, or any of its successor agreements, after June 15, 1983, the expiration date of the extant agreements (Pet. App. A4). While the subsequent bargaining history between respondent and the unions is unclear (*id.* at A5 & n.1), it is undisputed that respondent did not enter into any new collective bargaining agreements with the unions (*id.* at A5-A6) and ceased making contributions to petitioners on June 15, 1983 (*ibid.*). In November 1983, the Regional Director of the National Labor Relations Board (NLRB) refused to issue a complaint based on a charge by one of the unions that respondent had failed to bargain in good faith (*id.* at A5 n.1).

2. In December 1983, petitioners filed suit against respondent in the United States District Court for the Northern District of California, seeking to collect unpaid contributions for the period after June 15, 1983, while post-contract expiration negotiations were pending (Pet. 3). Petitioners alleged, inter alia, that respondent was bound under Section 8(a)(5) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(5), to honor during that period the contribution obligations established by the expired collective bargaining agreements, and that the court had jurisdiction under Section 301 of the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. 185, and Sections 502 and 515 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132, 1145, to enforce this obligation (Pet. App. A6-A7; Pet. 3). Respondent answered, inter alia, that any obligation it might

have under the NLRA was not within the jurisdiction of the district court and that, in any event, its negotiations with the unions were at "impasse" and it therefore had no NLRA-based contribution obligation (Br. in Opp. 2 n.1, 3). The court granted summary judgment for respondent, relying on *Cement Masons Health & Welfare Trust Fund* v. *Kirkwood-Bly, Inc.*, 520 F. Supp. 942 (N.D. Cal. 1981), aff'd for the reasons stated in the district court's opinion, 692 F.2d 641 (9th Cir. 1982). Pet. App. A7-A8; Pet. App. B.

3. The court of appeals affirmed on the ground that the district court had no jurisdiction under either Section 301 or ERISA (Pet. App. A1-A36). It acknowledged that "an employer's failure to honor the terms and conditions of an expired collective bargaining agreement pending negotiations on a new agreement constitutes bad faith bargaining in breach of sections 8(a)(1), 8(a)(5) and 8(d) of the [NLRA]" (Pet. App. A9-A10). But, it said, "a collective bargaining agreement does not 'survive' [its expiration] in the sense that it continues as a legally operative document" (*id.* at A12). Rather, the court said, "the agreement's terms 'survive' in order to define the parameters of the employer's obligation under section 8(a)(5) to maintain the status quo during negotiations" (*ibid.*). Accordingly, the court found that respondent was entitled to "summary judgment on the trust funds' section 301-based causes of action" (Pet. App. A16), since petitioners' suit sought to enforce rights created by the NLRA and not rights created by a collective bargaining agreement (*id.* at A12-A13, A16).

The court then turned to the question whether the district court had jurisdiction under Sections 502 and 515 of ERISA to enforce respondent's alleged NLRA-based post-contract expiration contribution obligation (Pet. App. A16-A31). The court noted that Section 502 confers jurisdiction on the district courts to enforce obligations

arising under Section 515 (Pet. App. A17 n.7) and that Section 515 requires an employer " 'who is obligated to make contributions to a multiemployer plan * * * under the terms of a collectively bargained agreement [to] * * * make such contributions in accordance with the terms and conditions of * * * such agreement' " (Pet. App. A16, quoting 29 U.S.C. 1145).[1] The court further noted that "a phrase similar to 'obligated to make contributions,' which appears in section 515, is defined elsewhere in [Section 4212(a) of] ERISA as 'an obligation to contribute arising * * * (1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law' " (*id.* at A21 (quoting 29 U.S.C. 1392(a)), and that "[s]ubpart 2 of this definition would seem to include obligations created by section 8(a)(5)" of the NLRA (*ibid.*)). But the court observed that Section 4212(a)'s definition of "obligation to contribute" is applicable only to the part of ERISA that imposes liability on employers upon withdrawal from multiemployer pension plans (Pet. App. A21-A22)[2] and said that "the similarity between the phraseology in section

[1] Section 515 of ERISA, 29 U.S.C. 1145, provides that:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

[2] Section 4212(a) of ERISA, 29 U.S.C. 1392(a), provides that:

> For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising—
>
> (1) under one or more collective bargaining (or related) agreements, or
>
> (2) as a result of a duty under applicable labor-management relations law, but
>
> does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

515 and that in [the first subpart of the Section 4212(a) definition indicates] * * * that Congress intended section 515 liability to be less extensive than withdrawal liability" (*id.* at A23-A24). Finally, the court found "[n]o indication * * * that, during its deliberations * * *, Congress even considered the problem of continuing obligations from expired agreements much less tha[t] it had a view on resolving any conflict between section 515 and the primary jurisdiction of the NLRB" (*id.* at A25-A26 (footnote omitted)).

In the absence of "useful statutory or Congressional guidance on section 515" (Pet. App. A31), the court concluded that "the matter [had to] be decided by the application of accepted labor law principles" (*ibid.*). The court then said that, "[w]hen presented with a dispute that involves adjudicating conduct which 'is arguably within the compass of [Section] 7 or [Section] 8 of the NLRA,' a federal court must defer to the primary jurisdiction of the NLRB" (*id.* at A31-A32 (quoting *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959)). Applying this principle, the court determined that respondent's "failure to pay contributions after the master agreements' expiration is, at least, an arguable unfair labor practice" (Pet. App. A33); that, "[w]hile admittedly the failure to pay may also violate section 515 of ERISA, adjudication of the merits depends entirely on the section 8(a)(5) determination" (*id.* at A33-A34); and that "[m]aking this underlying labor law determination is exclusively an NLRB matter" (*id.* at A34 (footnote omitted)). Accordingly, having found "no persuasive evidence in either the plain words or legislative history of ERISA * * * that Congress intended section 515 to be an exception to the general rule of NLRB preemption" (*id.* at A35-A36), the court held that "the primary jurisdiction of the [NLRB] preempts [petitioners'] * * * suit in district court under

sections 502 and 515 of [ERISA] to recover delinquent contributions accrued after a collective bargaining agreement has expired" (*id.* at A2).

DISCUSSION

Petitioners contend that Section 502 and 515 of ERISA give the district court jurisdiction over their action to collect contributions from respondent, where respondent's alleged obligation to contribute arises from its duty under the NLRA to refrain from unilaterally changing terms and conditions of employment during post-contract expiration collective bargaining.[3] This question is of immense practical importance to the administration and solvency of multiemployer employee benefit plans, and we believe the courts below erred in ruling that the district court lacked jurisdiction. Accordingly, we submit that the question warrants review by the Court at this time.

1. We start with the conclusion of the court of appeals that "the primary jurisdiction of the [NLRB] preempts [petitioners'] suit in district court under sections 502 and 515 of [ERISA] to recover delinquent contributions accrued after [the] collective bargaining agreement[s] ha[d] expired" (Pet. App. A2). We agree with the court that "[respondent's] failure to pay contributions after the master agreements' expiration [was], at least, an arguable unfair labor practice" (*id.* at A33) and that "adjudication of the merits [of petitioners' claims] depends entirely on the section 8(a)(5) determination" (*id.* at A34). We do not agree, however, that "this underlying labor law determination is exclusively an NLRB matter" (*ibid.*).

[3] Petitioners do not appear to contend in this Court that either the expired collective bargaining agreements or the pension plan documents require respondent to make such post-contract expiration contributions. Cf. *Pattern Makers' Pension Trust Fund* v. *Badger Pattern Works, Inc.*, 615 F. Supp. 792 (N.D. Ill. 1985) (fiduciary may enforce terms of pension plan against employer even though collective bargaining agreement has expired).

This Court has previously recognized that Congress has granted federal courts jurisdiction in certain circumstances to adjudicate NLRA-based rights. See *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 83-86 (1982); *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 635 n.17 (1975). In *Local 20, Teamsters Union* v. *Morton*, 377 U.S. 252 (1964), the Court held that, in Section 303 of the LMRA (29 U.S.C. 187), Congress authorized the federal courts to award damages to any person injured by a violation of Section 8(b)(4) of the NLRA (29 U.S.C. 158(b)(4)), even though the NLRB has concurrent jurisdiction to remedy such unfair labor practices. Similarly, in *Smith* v. *Evening News Ass'n*, 371 U.S. 195, 197 (1962), the Court found that "[t]he authority of the [NLRB] to deal with an unfair labor practice which also violates a collective bargaining agreement is not displaced by [Section] 301 [of the LMRA], but it is not exclusive and does not destroy the jurisdiction of the courts in suits under [Section] 301." See also *Vaca* v. *Sipes*, 386 U.S. 171 (1967) (federal court may adjudicate duty of fair representation claim in a suit under Section 301 of the LMRA even though the NLRB has concurrent jurisdiction under the NLRA to adjudicate such a claim). These cases show that federal courts in fact have jurisdiction to decide unfair labor practice questions "where it [cannot] be inferred that Congress intended exclusive jurisdiction to lie with the NLRB" (386 U.S. at 179).

This case presents the question whether, in Sections 502 and 515 of ERISA, Congress granted federal courts jurisdiction to enforce an obligation to make contributions to a pension fund where the source of that obligation is the NLRA. While neither the text nor the legislative history of these sections speaks directly to this question, we believe that the better reading of the sections is that

they confer such jurisdiction, including, in this instance, the power to decide whether respondent unilaterally changed terms and conditions of employment prior to reaching "impasse" in its negotiations with the unions, in violation of Section 8(a)(5) of the NLRA.

2. Section 502 of ERISA gives federal district courts juridiction over, inter alia, civil actions by plan fiduciaries to enjoin violations of Subchapter I of ERISA, to redress such violations, and to enforce the provisions of Subchapter I. Section 515 is part of Subchapter I of ERISA. See 29 U.S.C. 1145. The question, therefore, is whether Section 515 covers an employer's obligation under Section 8(a)(5) of the NLRA to continue to make contributions to the plan, in accordance with the terms of an expired agreement, during post-contract expiration collective bargaining.

a. Section 515 states that "[e]very employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement" (29 U.S.C. 1145). But the phrase "obligated to make contributions * * * under the terms of a collectively bargained agreement" is ambiguous. The phrase could be read to refer only to contribution obligations that arise from the collective bargaining agreement itself. See *Mo-Kan Teamsters Pension Fund* v. *Botsford Ready Mix Co.*, 605 F. Supp. 1441, 1444-1446 (W.D. Mo. 1985). On the other hand, the phrase may refer to any contribution obligation that is defined by "*the terms of* a collectively bargained agreement." On that view, Section 515 would encompass an NLRA-based contribution obligation, since that obligation would be defined by "the terms of a collectively bargained agreement." See *Laborers Health & Welfare Trust Fund* v. *Hess*, 594 F. Supp. 273, 279-280

(N.D. Cal. 1984); see generally *American Distributing Co.* v. *NLRB*, 715 F.2d 446, 452 (9th Cir. 1983), cert. denied, 466 U.S. 958 (1984) (emphasis added) (under the NLRA, "an employer is required to maintain the status quo and make payments in conformity with *the terms of an expired written agreement*"); *Hinson* v. *NLRB*, 428 F.2d 133, 139 (8th Cir. 1970) (emphasis added) ("[s]ince the status quo is quite obviously defined by reference to the substantive *terms of the expired contract*, it follows that, in a limited and special sense, those pertinent contractual terms 'survive' the expiration date").

Where more than one interpretation of statutory language is plausible, this Court has said that it will search for the " 'interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested' " (*Commissioner* v. *Engle*, 464 U.S. 206, 217 (1984), quoting *NLRB* v. *Lion Oil Co.*, 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part)). Accordingly, to determine whether Congress intended to make NLRA-based contribution obligations independently enforceable in direct, ERISA-based, federal court actions, we turn to the circumstances surrounding Section 515's enactment and to the place that Section 515 has in the overall ERISA scheme.

b. Congress enacted Section 515 as part of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208 *et seq.* In MPPAA, Congress attempted to address comprehensively the "problems which tend to discourage the maintenance and growth of multiemployer pension plans" (29 U.S.C. 1001a(c)(2)), and "to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans" (29 U.S.C. 1001a(c)(3)). To that end, Congress revised the system by

which the Pension Benefit Guaranty Corporation guarantees benefits to participants in multiemployer plans, mandated that employers withdrawing from multiemployer plans contribute whatever share of the plans' unfunded vested liabilities is attributable to their employees' prior participation in the plans, and created new federal enforcement mechanisms to facilitate the collection of both delinquent contributions and withdrawal liabilities. See 29 U.S.C. 1132(g)(2), 1145, 1322a-1322b; 29 U.S.C. (& Supp. III) 1381-1461. Section 515 is the enforcement mechanism that Congress created to facilitate the collection of delinquent contributions.

Delinquencies were among "[t]he most significant, and the oldest, day-to-day problem[s] faced by multiemployer plans" (*Oversight of ERISA, 1977: Hearings on S. 2125 Before the Subcomm. on Labor of the Senate Comm. on Human Resources,* 95th Cong., 1st Sess. 391 (1977) (testimony of Theodore Groom)), and Congress had studied them for some time.[4] During the course of this

[4] See, *e.g., Oversight of ERISA, 1977: Hearings on S. 2125 Before the Subcomm. on Labor of the Senate Comm. on Human Resources,* 95th Cong., 1st Sess. 391-394 (1977); *ERISA Improvements Act of 1978: Joint Hearings on S. 3017 Before the Subcomm. on Labor and Human Resources and the Subcomm. on Private Pension Plans and Employee Fringe Benefits of the Senate Comm. on Finance,* 95th Cong., 2d Sess. 123 (1978); *Multiemployer Pension Plan Amendments Act of 1979: Hearings on S. 1076 Before the Senate Comm. on Labor and Human Resources,* 96th Cong., 1st Sess. 523 (1979); *Multiemployer Pension Plan Termination Insurance Program: Hearing Before The Subcomm. on Oversight of the House Comm. on Ways and Means,* 96th Cong., 1st Sess. 121-122 (1979); *The Multiemployer Pension Plan Amendments Act of 1979: Hearings on H.R. 3904 Before the Task Force on Welfare and Pension Plans of the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor,* 96th Cong., 1st Sess. 772, 808 (1979); *The Multiemployer Pension Plan Amendments Act of 1979: Hearing on H.R. 3904 Before the House Comm. on Ways and Means,* 96th Cong., 2d Sess. 193 (1980).

study, Congress learned that, where delinquencies occur, plans lose investment income, incur increased administrative expenses (for detecting and collecting delinquencies), have greater difficulty formulating and meeting funding standards, and must require nondelinquent employers to fund the pensions of delinquent employers' employees. See 126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson); Staff of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *The Multiemployer Pension Plan Amendments Act of 1980, S. 1076: Summary and Analysis of Consideration* 43-44 (Comm. Print. 1980) [hereinafter cited as *Comm. Print*].[5] Moreover, Congress found that "[r]ecourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly" (126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson)).[6] Thus, those who proposed and supported Section 515's enactment described it as a mechanism that would "permit trustees to recover delinquent contributions ef-

[5] The Staff of the Senate Committee on Labor and Human Resources explained that:

> Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans. Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys fees and other legal costs arise in connection with collection efforts.

Comm. Print 43-44.

[6] The Staff of the Senate Committee on Labor and Human Resources explained that "[s]ome simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions" (*Comm. Print* 44).

ficaciously" (*id.* at 23288 (remarks of Sen. Williams)), "foster the preservation of the private multiemployer plan system * * * [by] discourag[ing] delinquencies and simplify[ing] delinquency collection" (*Comm. Print* 44), and "clarify the law * * * by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer" (126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson)).

Nothing in the legislative history of MPPAA indicates that Congress intended to limit the provisions of Section 515 to the enforcement of contractually based contribution obligations. Nor does the legislative history indicate that Congress intended to require trustees to recover pre-contract expiration and post-contract expiration delinquencies in different forums. Rather, the comments in the legislative history, while not speaking directly to the present issue, suggest an intention to provide plan trustees with a single, efficient cause-of-action for collecting all delinquent contributions, whatever the source of the obligation to contribute or the timing of the delinquency. See, *e.g.*, 126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson); *id.* at 23288 (remarks of Sen. Williams).

c. Our belief that Section 515 was intended to cover NLRA-based contribution obligations is fortified by the definition of "obligation to contribute" that appears in Section 4212(a) of ERISA. Section 4212(a) provides that an employer has an "obligation to contribute" when it has "an obligation to contribute arising (1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law * * *" (29 U.S.C. 1392(a)). As a result of the second clause of Section 4212(a), arbitrators and courts making *withdrawal* liability determinations plainly are required to take into account an employer's continuing NLRA-based contribution obligation (and are thus required to address the underlying Section 8(a)(5) question).

See *Comm. Print* 12-14; *Woodward Sand Co.* v. *Western Conference of Teamsters Pension Trust Fund*, 789 F.2d 691, 695 (9th Cir. 1986) (remanding for determination whether parties reached "impasse" before or after the effective date of MPPAA withdrawal liability provisions); *I.A.M. National Pension Trust Fund* v. *Schulze Tool & Die Co.*, 564 F. Supp. 1285, 1289-1296 (N.D. Cal. 1983) (court must decide "impasse" question in resolving withdrawal liability issue). The definition of "obligation to contribute" that appears in Section 4212(a) expressly applies only "[f]or purposes of [the withdrawal liability] part" of ERISA (29 U.S.C. 1392(a)). That definition may therefore "not apply elsewhere in the Act [by its] own force" (*Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 370 n.14 (1980)). But that definition "may otherwise reflect the meaning of the term[] defined as used in other Titles" of ERISA (*ibid.*). Because the delinquent contribution and withdrawal liability provisions were enacted at the same time and play complementary roles in the MPPAA scheme, we believe the better reading is that the term "obligated to make contributions," which appears in Section 515, has a meaning comparable to the phrase "obligation to contribute," which appears in Section 4212(a).[7]

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[7] The legislative history of the two provisions neither confirms nor refutes the point. The withdrawal liability provisions were introduced simultaneously in both houses of Congress on May 3, 1979. See H.R. 3904, 96th Cong., 1st Sess. (1979), *reprinted in The Multiemployer Pension Plan Amendments Act of 1979: Hearings Before the Task Force on Welfare and Pension Plans of the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 96th Cong., 1st Sess. 3 (1979); S. 1076, 96th Cong., 1st Sess. (1979), *reprinted in Multiemployer Pension Plan Amendments Act of 1979: Hearings Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 3 (1979). Neither bill contained a provision concerning delinquent employer contributions. See S. 1076, 96th Cong., 1st Sess. (1979); H.R. 3904, 96th Cong., 1st Sess. (1979).

In enacting MPPAA, Congress was particularly concerned that employers not escape their obligation to fund the pensions that multiemployer plans would be liable to pay the employers' employees. See 126 Cong. Rec. 23288 (1980) (remarks of Sen. Williams); *id.* at 23039 (remarks of Rep. Thompson); *id.* at 20180 (colloquy between Sen. Williams and Sen. Matsunaga). Accordingly, in Section 515, the delinquent contribution provision,[7] Congress mandated that, when an employer has become "obligated to make contributions," it "shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan * * *." Concomitantly, in the withdrawal liability provisions, Congress mandated that, when an employer "withdraws from a multiemployer plan in a complete withdrawal[,] * * * the employer [shall be] liable to the plan" for a portion of the plan's unfunded vested benefits such that the burden of its employees' pensions will not fall on the remaining employers or plan beneficiaries (29 U.S.C. 1381(a)(1)). Importantly, Congress provided that a "complete withdrawal" would be deemed to occur only when the employer has "permanently cease[d] to have an obligation to contribute under the plan" (29 U.S.C. 1383(a)(1)).

Applying different definitions to the contribution obligations identified in the delinquent contribution and withdrawal liability provisions would leave an unwarranted gap in this "comprehensive and reticulated" scheme

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The provision for delinquent contributions was added later by floor leaders in both houses. 126 Cong. Rec. 23039 (1980); *id.* at 23288. The legislative history does not directly discuss the connection between the delinquent contribution and withdrawal liability provisions, except to state that they should be enforced in the same manner. See *The Multiemployer Pension Plan Amendments Act of 1979: Hearings on H.R. 3904 Before the Task Force on Welfare and Pension Plans of the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 96th Cong., 1st Sess. 808 (1979); 126 Cong. Rec. 23039 (1980); *id.* at 23288-23289.

(*Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. at 361). ERISA would provide plan trustees with an independent means for enforcing an employer's obligations arising during the term of the underlying collective bargaining agreement and for enforcing an employer's obligation to pay withdrawal liability, but ERISA would not provide plan trustees with an independent means for enforcing an employer's obligation to fund its employees' pensions between the expiration date of the employer's collective bargaining agreement and the date of the employer's complete withdrawal from the plan, even though the employer would *have* such an obligation and even though ERISA would require plan trustees to credit all employee service performed during that period. See 29 U.S.C. 1053(b)(1)(G) ("all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account"); *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, No. 82-2157 (June 19, 1985), slip op. 6-7 n.7 (quoting Dep't of Labor Advisory Op. 78-28A (Dec. 5, 1978), *reprinted in* Pens. Rep. (BNA) No. 221, at R-25 (Jan. 8, 1979)). We find no evidence that Congress intended to leave such a gap in the provisions it enacted specifically to address the many "problems which tend to discourage the maintenance and growth of multiemployer pension plans" and to "provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans" (29 U.S.C. 1001a(c)(2) and (3)).[8]

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[8] To the contrary, we note that Congress provided that, for purposes of federal court enforcement, the delinquent contribution and withdrawal liability provisions should be "treated in the same manner" (29 U.S.C. 1451(b)). See also 29 U.S.C. 1401(d) ("if the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title)").

d. To be sure, the trustees could file a charge with the NLRB seeking to recover delinquent contributions in that forum. But we do not believe that Congress intended trustees to have only this limited recourse.

The NLRA enforcement scheme is designed to facilitate the resolution of labor disputes, not the collection of delinquent contributions. The NLRA, for example, vests the NLRB's General Counsel with "unreviewable discretion to refuse to institute an unfair labor practice complaint." *Vaca* v. *Sipes*, 386 U.S. at 182. Thus, requiring multiemployer pension plan trustees to resort to the NLRB may, in some circumstances, mean that they have no recourse for collecting delinquencies at all. Moreover, even where the General Counsel issues an unfair labor practice complaint, the NLRB does not allow interested third parties such as plan trustees to obtain discovery. See C. Morris, *The Developing Labor Law* 1625 (1983). In addition, the NLRA authorizes the General Counsel and NLRB to settle unfair labor practice charges without obtaining the charging party's consent and for less than "make-whole" relief. See 29 U.S.C. 160(c); 29 C.F.R. 101.2, 101.4, 101.9(c). Thus, the trustees' interest in fully collecting all contributions owed to a pension plan may be compromised. Cf. *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 337 (1981) (trustees have "obligation to enforce the terms of the collective bargaining agreement regarding employee fund contributions against the employer for the sole benefit of the beneficiaries of the fund"). Finally, the NLRB cannot impose any type of punitive sanction. See *Wisconsin Dep't of Industry, Labor & Human Relations* v. *Gould*, No. 84-1484 (Feb. 26, 1986), slip op. 5-6 & n.5. It therefore has only a limited ability to deter employers from becoming delinquent in the first place.

In contrast, the ERISA enforcement scheme is specially designed to "foster the preservation of the private multiemployer plan system * * * [by] discourag[ing] delinquencies and simplify[ing] delinquency collection" (*Comm. Print* 44). Section 515 provides trustees with a direct, unambiguous cause-of-action for collecting delinquencies. The trustees have exclusive control over the action and thus no third party can compromise their interest in collecting all contributions owed to a plan. See *NLRB* v. *Amax Coal Co.*, 453 U.S. at 336. Moreover, liberal rules of discovery govern the action and provide trustees with a means for determining whether and to what extent contributions are actually owing and delinquent. Finally, Section 502(g)(2) of ERISA *requires* courts, where trustees are victorious, to award reasonable attorney's fees, costs, unpaid contributions, interest on the unpaid contributions, and an additional amount equal to the greater of interest or specified liquidated damages. See 29 U.S.C. 1132(g)(2). Thus, the ERISA enforcement scheme adds some important muscle to the trustees' struggle against delinquent contributors and delinquent contributions.

When Congress created this special enforcement scheme, it stated that "recourse available under current law for collecting delinquent contributions [was] insufficient and unnecessarily cumbersome and costly" (126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson)). NLRB enforcement proceedings were part of the then-available recourse. Accordingly, we do not believe that Congress intended to require plan trustees to resort to the NLRB for enforcement of NLRA-based contribution obligations. Rather, Congress presumably expected that Section 515 would cover these obligations as well.

3. Although its opinion is not altogether clear on the point (compare Pet. App. A21-A26 with A26 n.12 and A33-A34), the court below at one point acknowledged that "the failure to pay may also violate section 515 of ERISA" (*id.* at A33). It found, however, that the language and legislative history of Section 515 are sufficiently ambiguous to require that its interpretation be resolved by

reference to "accepted labor law principles," specifically, the principle that the NLRB has primary jurisdiction to resolve unfair labor practice questions. See Pet. App. A31-A32. We do not think that the question of Congress's intent under Section 515 can be resolved in this fashion.

As a general rule, of course, the NLRA does vest the NLRB with primary jurisdiction to decide unfair labor practice questions. "Congress * * * considered that centralized administration of specially designed procedures was necessary to obtain uniform application of [the NLRA's] substantive rules and to avoid th[o]se diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies" (*Garner* v. *Teamsters Union*, 346 U.S. 485, 490 (1953)). As we noted above, however, Congress has occasionally determined that this concern for uniformity of decision should yield to other considerations and, in such situations, has established independent mechanisms for enforcing particular NLRA-based rights. See, *e.g.*, *Local 20, Teamsters Union* v. *Morton*, 377 U.S. 252 (1964) (29 U.S.C. 187 creates an independent basis for enforcing the prohibitions set forth in Section 8(b)(4) of the NLRA); *Vaca* v. *Sipes*, 386 U.S. 171 (1967) (29 U.S.C. 185 creates an independent basis for enforcing the duty of fair representation embodied in Section 9(a) of the NLRA, 29 U.S.C. 159(a)). Thus, reference to general primary jurisdiction rules merely begs the question whether "Congress intended exclusive jurisdiction to lie with the NLRB" (*Vaca* v. *Sipes*, 386 U.S. at 179). Rather, the question whether the concern for uniformity of decision should yield to other considerations must be determined by reference to the language, legislative history, and purposes of the federal statute alleged to create the independent enforcement mechanism—in this instance, Section 515 of ERISA.[9]

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[9] Ordinarily, of course, "assessing the significance of impasse and the dynamics of collective bargaining is precisely the kind of judgment

4. In our view, the language, legislative history, and purposes of Section 515 of ERISA compel the conclusion that Congress created an independent mechanism for enforcing contribution obligations arising out of the NLRA-based duty to refrain from unilaterally changing terms and conditions of employment during post-contract expiration collective bargaining. The court below is not alone, however, in reaching a contrary judgment. See, *e.g.*, *Moldovan* v. *Great Atlantic & Pacific Tea Co.*, 790 F.2d 894 (3d Cir. 1986); *U.A. 198 Health & Welfare, Education & Pension Funds* v. *Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir. 1986); *Mo-Kan Teamsters Pension Fund* v. *Botsford Ready Mix Co.*, 605 F. Supp. 1441 (W.D. Mo. 1985); *Pattern Makers' Pension Trust Fund* v. *Badger Pattern Works, Inc.*, 615 F. Supp. 792 (N.D. Ill. 1985); but see *Laborers Health & Welfare Trust Fund* v. *Hess*, 594 F. Supp. 273 (N.D. Cal. 1984). These decisions spell serious adverse consequences for the financial stability of multiemployer plans, which are as adversely affected by post-contract expiration delinquencies as they are by pre-contract expiration delinquencies. Given the congressional interest reflected in MPPAA in maintaining the

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that * * * should be left to the Board" (*Charles D. Bonanno Linen Service* v. *NLRB*, 454 U.S. 404, 413 (1982)). Accordingly, a federal court ordinarily should refrain from deciding any "impasse" question that is pending before the NLRB. See *Northern California District Council of Hod Carriers* v. *Opinski*, 673 F.2d 1074, 1075-1076 (9th Cir. 1982). Thus, if the General Counsel has issued a complaint concerning a bad faith bargaining charge filed by either the trustees of a plan or a union, a federal court concurrently considering a Section 515 enforcement action by the trustees should presumably refrain from deciding the impasse issue and await that issue's resolution by the NLRB. The NLRB decision would be binding in the trustees' federal court action, provided that the trustees had an adequate opportunity to litigate the issue in the NLRB proceeding. See *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 272 (1964); *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-422 (1966).

financial health of multiemployer plans, we believe that the question whether trustees may enforce NLRA-based contribution obligations in federal court deserves the immediate attention of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

LOUIS R. COHEN
Deputy Solicitor General

GLEN D. NAGER
Assistant to the Solicitor General

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

CAROL A. DE DEO
Deputy Associate Solicitor

ELLEN L. BEARD
Attorney
Department of Labor

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board

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